Supreme Court, U.S.
FILED
JUN 15 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-1844

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

THE STATE OF ARIZONA, Petitioner,

vs.

JEFFREY LYNN IKIRT, Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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JURISDICTIONAL QUESTION

In striving to convince this Court that it lacks jurisdiction over this case, Respondent seems to have missed the point of Michigan v. Long, 463 U.S. 1032 (1983). Whether a state statutory or constitutional provision exists that may be "sufficient" to support the state court's holding (Brief in Opposition at 9, 10), or whether such state authorities were even referred to in the questioned decision, is basically irrelevant. The rule of Long is that, unless the state court decision clearly and explicitly relies on those potentially jurisdiction-depriving state provisions, this Court does have jurisdiction over the case.

> [W]hen, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the fact of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions,

> then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached... If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.

(463 U.S. at 1040-41.)

The Arizona Supreme Court's decision in this case certainly does "fairly appear to rest primarily on federal law". The most direct statement of the holding relies exclusively on this Court's decision in Griffin v. California, 380 U.S. 609 (1965):

> We have concluded that the case must be reversed because the prosecutor improperly commented on the defendant's failure to testify. Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965).

(Appendix 2 to the Petition, Reproduced Slip Op. at 5.) Similarly, in characterizing Ikirt's claim, the Arizona Supreme Court said:

> Relying on Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965), the defendant contends that the prosecutor's comment

> violates his fifth amendment right against self-incrimination. In Griffin, the United States Supreme Court held that any comments by a prosecutor about the failure of the defendant to testify violates a defendant's right against self-incrimination.

(Id. at 7.) There is no "plain statement in its judgment that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached." This decision does not "indicate clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds;" if it did, the Brief in Opposition would not need to expend nine legal-size pages trying to demonstrate that it does. Thus, the Brief in Opposition actually tends to prove the existence of this Court's jurisdiction in this case.

Pool v. Superior Court, 139 Ariz. 98, 677 P.2d 261 (1984), cited by the Brief in Opposition at 13-14, is not as applicable as Respondent would have this Court believe, because Pool was concerned with the double

jeopardy portion of Arizona Constitution Art. 2 § 10, rather than the right to silence provision. However, what Pool and the other cases cited on pages 13-14 of the Brief in Opposition do prove, as does State v. Ault, 150 Ariz. 459, 466, 724 P.2d 545, 552 (1986), is that when it really desires to do so, the Arizona Supreme Court knows exactly how to comply with Long. As this Court observed in Harris v. Reed, ___ U.S. ___, 109 S.Ct. 1038, 1044 (1989), "state courts have become familiar with the 'plain statement' requirement under Long and Caldwell." Armed with such proven familiarity, the Arizona Supreme Court did not even attempt in this case to give the sort of "plain statement" required by Long, so this Court certainly does have jurisdiction. "[A]mbiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action." Minnesota v. National Tea Co., 309 U.S. 551, 557 (1940), quoted approvingly in Michigan v. Long, 463

U.S. at 1041.

ARGUMENTS ON THE MERITS

I.

THERE WAS NO VIOLATION OF GRIFFIN V. CALIFORNIA, 380 U.S. 609 (1965), IN THIS CASE.

Consistent with its erroneous view that the Arizona Supreme Court based the decision in this case on independent state grounds, the Brief in Opposition abjures all discussion of Griffin v. California. This tactic permits Respondent to evade acknowledgment of the fact that this Court has so strictly circumscribed the Griffin doctrine that it cannot reasonably be applied to the circumstances of this case, but that fact nonetheless exists. See the Petition at 4-13.

Griffin's holding was that the Fifth Amendment "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." (380 U.S. at 615.) Here the prosecutor merely remarked to the judge that the defendant was present, in the course of a convoluted discussion of the

applicability of the hearsay rule, after the jury had been instructed that lawyer talk is not evidence, and that evidentiary rulings were not matters for their concern. (R.T. Vol. II. at 58-59, 61.) Only by the most tenuous extrapolation of inferences upon inferences is it possible to conjure up some shadowy suggestion that Ikirt might not take the witness stand (the defense case not yet having concluded), and that if he did not testify the jury should read something into that failure because of what the prosecutor was discussing with the judge (despite their specific instructions not to pay attention to such discussions), and that if they read something into the still hypothetical failure to testify, it should be that the defendant was tacitly acknowledging his guilt (even though they had all agreed under oath during voir dire that the defendant is free not to testify, and that his failure to take the witness stand cannot be held against him -- R.T. Vol. II. at 39-41).

The "reasoning" would be laughable were

the situation not so serious -- the highest court of a state, sadly misconstruing a clear holding of this Court, to free a man fairly convicted of an extremely serious and potentially dangerous crime. Not only should this Court grant certiorari to correct this misinterpretation of Griffin, but the simplicity of the circumstances and the blatancy of the error suggest that a summary reversal of the Arizona Supreme Court would not be inappropriate.

II.

IT IS DENIED THAT ANY ERROR OCCURRED HERE, BUT IF ERROR THERE WAS, IT CERTAINLY WAS HARMLESS BEYOND A REASONABLE DOUBT.

The Brief in Opposition, relying on Eberhardt v. Bordenkircher, 605 F.2d 275 (6th Cir. 1979), seeks to argue that the claimed error could not be harmless, but the analysis is totally unconvincing. Ikirt's alibi defense was not credible, because every one of the defense witnesses who testified about him being someplace other than the crime scene was completely impeached, and because Ikirt not

once but repeatedly made admissions that were legitimately received into evidence. (See Petition at 26-29.) Thus, this was not a case based entirely on circumstantial evidence, and in any event, the allegedly improper remark was so innocuous that it could not possibly have affected the outcome.

The Brief in Opposition makes much of the absence in this case of a strong curative instruction, but that lies at the door of the defense, which rejected the trial court's offer to give such an instruction. (R.T. Vol. VIII. at 29-30.) Moreover, no other errors have been held cognizable in the Arizona courts or even described to this Court. The Brief in Opposition wants this Court to buy a legal "pig in a poke" by ruling that an innocuous alleged error is harmful because of other errors that have not even been specified to you! If we want to cumulate factors, 0 + 0 = 0. Indeed, the facts of Eberhardt are extreme and so different from those in this case (including pointing at the defendant and asking who else could have testified), that

it is easily distinguishable -- as the Sixth Circuit itself noted in Butler v. Rose, 686 F.2d 1163, 1175 (6th Cir. 1982). It certainly does not require the conclusion that the "error" alleged here was harmful.

CONCLUSION

It is denied that what occurred here was a Griffin error. Assuming arguendo that it somehow is deemed to have been error, the prosecutor's remark certainly was harmless beyond a reasonable doubt. Therefore, no matter how the case is approached, certiorari should be granted and the decision of the Arizona Supreme Court should be reversed.

RESPECTFULLY SUBMITTED,

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